No. 82-1327

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

v.

THE STATE OF CALIFORNIA, *et al.*,
Respondents.

BRIEF OF PETITIONERS WESTERN OIL AND GAS ASSOCIATION, *ET AL.*

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QUESTION PRESENTED

Whether the lower court erred in holding that the initial leasing stage of an Outer Continental Shelf (OCS) project "directly affect[s]" a state's coastal zone and must be preceded by a written determination that it can be conducted "to the maximum extent practicable, consistent with approved state management programs" pursuant to Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), because activities might be authorized at later stages of the project which could possibly affect the coastal zone?[1]

PARTIES TO PROCEEDINGS BELOW

This litigation was instituted through separate, but virtually identical, complaints filed by the State of California, acting through Governor Brown, and five agencies of the State and by the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53.

Plaintiffs sued James G. Watt, the Secretary of the Interior, as well as Edward Hastey and Robert Burford, both of whom held positions within the Department of the Interior. Also named as defendants were the Department and its Bureau of Land Management.

Intervening as defendants and appearing as appellants in the Ninth Circuit were the Western Oil and Gas Association (WOGA), a regional trade association, and twelve of its members, Amoco Production Co., Atlantic Richfield Co., Champlin

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[1] Petitioners also disagree with the Ninth Circuit's holding that environmental groups and local governments have standing to sue under Section 307(c)(1). However, since petitioners do not challenge California's standing, they did not present a question in their petition for certiorari concerning the standing of other parties. *See* Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160 (1981).

Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Elf Aquitaine Oil & Gas Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co.[2]

Subsequently, various local governmental entities within California intervened as plaintiffs in the case commenced by the State: The Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma; the Cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside; and the Association of the Monterey Bay Area governments.

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[2] The parties joining in this brief are WOGA, Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Conoco, Inc., Elf Aquitaine Oil & Gas Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Pursuant to Rule 28.1, the corporate parties named their parent companies, subsidiaries, and affiliates in their petition for certiorari at ii-v. To the best of counsel's knowledge, there have been no subsequent changes in the identified companies.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 683 F.2d 1253 and is reprinted in Appendix A(1a) to the petition for certiorari. The opinion of the United States District Court for the Central District of California is reported at 520 F. Supp. 1359 and is reprinted in Appendix B(37a) to the petition.

JURISDICTION

On August 12, 1982, the United States Court of Appeals for the Ninth Circuit entered a judgment affirming in part, reversing in part, vacating in part, and staying in part the decision of the district court. The Ninth Circuit's judgment is reprinted in Appendix C(90a) to the petition for certiorari. On November 10, 1982, that court denied petitions for rehearing filed by California and the environmental group plaintiffs. The court's

order denying rehearing is reprinted in Appendix D(91a) to the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1), provides:

> "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

Section 19 of the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. § 1345, provides in pertinent part:

> "(a) Any Governor of an affected State or the executive of any affected local government in such State may submit recommendations to the Secretary [of the Interior] regarding the size, timing, or location of a proposed lease sale. . . .
>
> "(c) The Secretary shall accept recommendations of the Governor . . . if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and well-being of the citizens of the affected State. . . ."
>
> "(d) The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of the affected State shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale . . . unless found to be arbitrary or capricious."

STATEMENT OF THE CASE

This case requires the Court to decide to what extent, if any, a state administrative processes must be complied with by the Secretary of the Interior in selecting Outer Continental Shelf (OCS) tracts for leasing. California and its allies, advocating the view that this state process controls, challenge the Department of the Interior's decision to offer for leasing 29 (of 111) tracts in the Santa Maria Basin located on federal lands, more than three miles offshore the California counties of Santa Barbara and San Luis Obispo.

The lower courts held that the leasing of those tracts complied with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1976), that it did not violate the Endangered Species Act (ESA), 16 U.S.C. § 1531 (1976) or the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361, and that the Secretary of the Interior was not arbitrary or capricious in determining that the leasing of those tracts was in the national interest pursuant to Section 19 of the OCSLA, 43 U.S.C. § 1345.

While thus rejecting the arguments of California and its co-plaintiffs based upon these federal statutes, the lower courts agreed with their arguments that the Secretary had paid inadequate attention to a state administrative process in determining the selection of OCS tracts for leasing. Specifically, the district court and the Ninth Circuit, interpreting Section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1), enjoined the Secretary of the Interior from leasing the 29 tracts complained of by California until he determines that their leasing is consistent, to the maximum extent practicable, with California's CZMA program.

A. Administrative Proceedings Prior To OCS Sale No. 53

1. Proceedings Before The Department Of The Interior

Planning for the leasing of Santa Maria Basin OCS tracts, designated OCS Sale No. 53, commenced in 1977.[3] 42 Fed. Reg. 60794 (Nov. 29, 1977). In June 1980, a draft Environmental Impact Statement (EIS) was published which discussed oil and gas operations in the Santa Maria Basin, as well as four other basins located to the north—Eel River, Port Arena, Bodega Bay, and Santa Cruz. The final EIS for Sale No. 53 was completed in September 1980.

Paralleling the NEPA process, administrative proceedings were initiated under the ESA. Of relevance here, on September 8, 1980, the Fish and Wildlife Service (FWS) provided its biological opinion that neither leasing nor exploration in the Sale No. 53 area is "likely to jeopardize the continued existence of the [southern] sea otter," a "threatened species" under the ESA. C.R. 85; Administrative Record (A.R.) 183w at 14. The FWS went on to assert that, if leasing and exploration ultimately led to the development and production of oil in the region, it would be necessary to reinstitute consultation.

The Department of the Interior then commenced the process contemplated by Section 19 of the OCSLA. A Secretarial Issue Document (SID) was prepared to guide former Secretary Andrus' proposed selection of tracts for Sale No. 53. C.R. 19; Def. Ex. L-C. On October 16, 1980, he proposed to delete all of the tracts in the four northern basins from Sale No. 53, but to offer all of the Santa Maria Basin tracts for leasing. 45 Fed. Reg. 71139 (Oct. 27, 1980).

Section 19(b) of the OCSLA, 43 U.S.C. § 1345(b), provides that a governor may make "recommendations" as to the "size,

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[3] OCS tracts are leased for a term of years, not sold in fee simple. However, since the leases are auctioned to high bidders, the process of bidding is referred to as an "OCS lease-sale" or an "OCS sale." *See* 43 U.S.C. § 1337(a).

timing, or location of a proposed lease sale" within 60 days after receiving the Secretary's proposed leasing decision. On December 24, 1980, California's former Governor Brown recommended that 34 northern tracts in the Santa Maria Basin be deleted, since they "are directly seaward of the habitat, breeding and food supply areas of the Southern Sea Otter." (J.A. 81, 82).

After assuming office, Secretary Watt decided to reconsider Secretary Andrus' proposed Sale No. 53 decision. In doing so, he was advised by the Office of Fish, Wildlife and Parks that deletion of the 34 tracts referred to by Governor Brown "will have an insignificant impact on the risk" potentially created by the production and development of oil in that area. C.R. 85; A.R. 237w at 2. On February 10, 1981, Secretary Watt transmitted to Governor Brown a revised proposed notice of sale, which confirmed Secretary Andrus' decision to lease all Santa Maria tracts. Secretary Watt also tentatively reinserted the four northern basins into the sale. C.R. 85; A.R. 240w.

On April 7, 1981, Governor Brown responded to Secretary Watt's February 10 letter. C.R. 85; A.R. 405w. Governor Brown recited at length California's objections to leasing the four northern basins. *Id.* at 2-9. He also reiterated the position he had taken in his December 24 letter complaining of Secretary Andrus' decision to lease the 34 northern tracts of the Santa Maria Basin.

On April 10, 1981, Secretary Watt announced his Sale No. 53 decision. C.R. 85; A.R. 421w. As explained in his subsequent letter to Governor Brown (J.A. 135), he decided to delay leasing the four northern basins to give "thorough analysis and consideration" to the Governor's April 7 recommendations. *Id.* However, after "extensive examination of information relating to the proposed notice of sale issued last October on OCS offering #53, including the comments and recommendations in your letter of December 24, 1980," he decided to lease all Santa Maria Basin tracts. This decision was based upon an analysis which showed that the "national benefits far outweigh[ed] the potential for harm to the well-being of the citizens of Califor-

nia" associated with the production of oil and gas from the northern Santa Maria Basin tracts. *Id.*

On April 27, 1981, Interior published a final notice of sale soliciting sealed bids on all Santa Maria Basin tracts and setting May 28, 1981, as the date upon which they would be opened. 46 Fed. Reg. 23673.

2. The State CZMA Process

On November 7, 1977, the Acting Assistant Administrator of the National Oceanic and Atmospheric Administration (NOAA), exercising authority delegated to him by the Secretary of Commerce, approved the California Coastal Management Program (CCMP) pursuant to Section 306 of the CZMA, 16 U.S.C. § 1455. *See American Petroleum Institute* v. *Knecht*, 456 F. Supp. 889, 893-94 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). California thereby became the first State to have a federally-approved CZMA program, thus empowering California to insist, under Section 307(c)(1) of the CZMA, that all federal activities "directly affecting" the California coastal zone be conducted in a manner "consistent to the maximum extent practicable" with the CCMP.

Applying a restrictive standard of judicial review, both the district court and the Ninth Circuit rejected judicial challenges to NOAA's approval of the CCMP. *American Petroleum Institute* v. *Knecht*, 456 F. Supp. 889, 609 F.2d 1306.

> "[U]nder our so-called federal system, the Congress is constitutionally empowered to launch programs the scope, impact, consequences and workability of which are largely unknown, at least to the Congress, at the time of enactment; the federal bureaucracy is legally permitted to execute the congressional mandate with a high degree of befuddlement as long as it acts no more befuddled than the Congress must reasonably have anticipated; if ultimate execution of the congressional mandate requires interaction between federal and state bureaucracy, the resultant

maze is one of the prices required under the system." 456 F. Supp. at 931.[4]

The CCMP which survived this restricted judicial review did not specify which land and water uses in the coastal zone the State would later find consistent with its program. Indeed, the district court agreed with California

> "that Congress never intended that to be approvable under § 306 a management program must provide a 'zoning map' which would inflexibly commit the state in advance of receiving specific proposals to permit particular activities in specific areas. Nor did Congress intend by using the language of 'objectives, policies and standards' to require that such programs establish such detailed criteria that private users be able to rely on them as predictive devices for determining the fate of projects without interaction between the relevant state agencies and the user." 456 F. Supp. at 919.

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[4] The district court's unusually candid description of the CZMA legislative scheme and administrative process further confirms that its rejection of the judicial attack upon the CCMP was based upon the highly deferential standard of review that it felt obliged to exercise:

> "The court has before it for determination . . . questions of the highest importance, greatest complexity, and highest urgency. They arise as a result of high legislative purpose, low bureaucratic bungling, and present inherent difficulty in judicial determination. . . . [F]or the high purpose of improving and maintaining felicitous conditions in the coastal areas of the United States, the Congress has undertaken a legislative solution, the application of which is so complex as to make it wholly unmanageable. In the course of the legislative process, there obviously came into conflict many competing interests which, in typical fashion, the Congress sought to accommodate, only to create thereby a morass of problems between the private sector, the public sector, the federal bureaucracy, the state legislature, the state bureaucracy, and all of the administrative agencies appurtenant thereto." 456 F. Supp. at 895-6.

Representative of its general nature, the provision of the CCMP, upon which California principally relies in this case in challenging the leasing of the 29 disputed tracts, states that:

> "Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes." Cal. Pub. Res. Code § 30230 (1976).

On July 8, 1980, California commenced efforts to use its CZMA program to restrict Secretary Andrus' selection of Sale No. 53 tracts for leasing. It took the position that OCS lease sales are federal "activities directly affecting" the coastal zone within the meaning of Section 307(c)(1). The Secretary was accordingly asked to make a "consistency determination" that his selection of tracts for OCS Sale No. 53 would be consistent to the maximum extent practicable with the CCMP. (J.A. 63).[5]

On October 22, 1980, an Assistant Secretary of the Interior responded to this request, stating that Interior had "assessed the possible effects of the Department's pre-lease activities [including tract selection] associated with OCS Lease Sale No. 53 and found that none directly affects the California coastal zone." (J.A. 66). Explaining this finding, he said that the Department had determined that

> "no lessee will be required, as a result of and as the next step following lease award, to undertake an activity with coastal zone effects. In all cases the lessee and the Deputy Conservation Manager must first exercise discretion by making subsequent decisions to initiate for approval and to approve specific action proposals before the coastal zone could be affected." (J.A. 66).

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[5] The requirement of preparing a "consistency determination" for federal activities "directly affecting the coastal zone" arises out of regulations, not the CZMA itself. *See* 15 C.F.R. §§ 930.34, 930.39(a).

Although thus rebuffed in its efforts to obtain a consistency determination from the Department of the Interior, the California Coastal Commission (CCC), the state agency which administers the CCMP, nevertheless proceeded to recite its own views as to the consistency of leasing tracts included within the Santa Maria Basin. On December 16, 1980, it adopted a resolution objecting to leasing those 31 northern tracts in the Santa Maria Basin within 12 miles of the range of the southern sea otter. (J.A. 73). This position was grounded upon the CCC's assessment of the national interest:

> "weighing the national interest in protecting the small population of the threatened southern sea otter against the petroleum resource potential of the 31 tracts in the northern part of the Santa Maria Basin comes out in favor of the threatened sea otter. . . ." (J.A. 76).

In so opposing the leasing of these Santa Maria Basin tracts, the CCC did not quarrel with the adequacy of the EIS or with the biological opinion rendered by the FWS, both of which demonstrated that leasing and exploration could go forward without jeopardy to the sea otter.

Secretary Watt's tentative reinsertion of the four northern basins into the proposed sale prompted another CCC resolution. On March 31, 1981, it resolved that leasing of the four northern basins would not be consistent with the CCMP. (J.A. 109). The CCC also reiterated its opposition to the inclusion of the 31 northern tracts in the Santa Maria Basin. (J.A. 110).

In finding a lack of consistency as to the 31 disputed Santa Maria Basin tracts, the CCC identified Section 30230 of the California Coastal Act as the "main part of the CCMP that addresses protection of marine resources." *See* p. 8, *supra*. The CCC then asserted that this provision of the CCMP mandated a 12-mile buffer zone between the sea-otter habitat and OCS leasing. (J.A. 122).

The CCC also referred to Section 30240 of the Coastal Act, Cal. Pub. Res. Code § 30240, which provides that "environmentally sensitive habitat areas shall be protected"

and stated that this section barred OCS leasing within six miles of marine mammal and sea bird breeding areas and within 12 miles of the southern sea otter, since, in the CCC's view, there were "deficiencies in oil spill control equipment and procedures." (J.A. 124). The Commission made no findings to support its choice of a 12-mile zone for sea otters nor of the less restrictive zone for other species.

Finally, the CCC recognized that Section 30260 of the Coastal Act, Cal. Pub. Res. Code § 30260, allows the location of coastal-dependent industrial facilities in or near the coastal zone, notwithstanding other provisions of the CCMP, if alternative locations are infeasible, if adverse environmental effects are mitigated to the maximum extent feasible, and if "to do otherwise would adversely affect the public welfare." Recognizing that OCS tracts are not capable of being located elsewhere and apparently satisfied with the mitigating measures proposed for the Santa Maria Basin, the CCC found that these two requirements of Section 30260 were met. However, finding that the "public welfare" referred to in the CCMP is "analogous to the national interest" (J.A. 127), the CCC declared that the national interest did not permit the leasing of any tracts within 12 miles of the sea otter habitat. The CCC's conception of the national interest was based upon the FWS biological opinion as to the sea otter, even though it had found that leasing would not jeopardize the species, and upon the "decided national interest in protecting a federally designated threatened species." (J.A. 129).

B. Proceedings In The Lower Courts

1. The District Court's Decision

On April 29, 1981, California and various environmental groups filed separate complaints seeking an injunction against leasing the 34 northernmost Santa Maria Basin tracts referred to in Governor Brown's OCSLA Section 19 recommendations to the Secretary. This part of plaintiffs' suit was grounded in the OCSLA, NEPA, ESA, and MMPA. Plaintiffs also sought an injunction against leasing 31 of those 34 tracts on the basis of

the positions staked out by the CCC in interpreting the CCMP.[6]

On May 27, 1981, acting on plaintiffs' motions for preliminary injunction, the district court ruled that plaintiffs had not shown a probability of success on their OCSLA, NEPA, ESA, or MMPA claims. However, it held that plaintiffs would probably succeed on their CZMA theory that OCS leasing is an activity "directly affecting" the coastal zone and thus cannot be conducted in the absence of a determination that leasing will be consistent with an approved CZMA program. The court, therefore, entered a preliminary injunction which allowed bids on the CZMA-challenged tracts to be opened, but enjoined the Secretary from accepting those bids.

On May 28, 1981, the Santa Maria Basin lease sale took place as scheduled.[7] Bids on 19 of the CZMA-challenged tracts were submitted. Collectively, the high bids on those tracts totalled more than $220 million. Pursuant to Department of the Interior regulations, 20% of this amount—$44 million—was deposited with those high bids.[8]

On August 18, 1981, the district court entered summary judgment for defendants with respect to all but one of plaintiffs' challenges to Sale No. 53. The court found that the EIS for the sale satisfied NEPA. (74a-77a). It ruled that the Secretary had correctly determined under the ESA that OCS Sale No. 53 would not jeopardize the southern sea otter, recognizing that it

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[6] A number of local governments from the California coastal region intervened as plaintiffs in the case initiated by California. Western Oil and Gas Association and 12 of its members intervened as defendants in both the California and environmental group action.

[7] The final notice consolidated the 115 tracts that had been described in the proposed notice sent to Governor Brown into 111 tracts covering precisely the same area. By virtue of this consolidation, the 34 tracts complained of by the Governor were reduced to 32 and the 31 focused upon by the CCC were reduced to 29.

[8] 43 C.F.R. § 3316.4.

was not necessary, at the leasing stage of the project, to deal with jeopardy issues that could arise only at the later development/production stage of the project. (82a-85a). The court held that OCS Sale No. 53 would not constitute a prohibited taking under Section 9 of the ESA or the MMPA. (85a-86a). Finally, the court acknowledged that the Secretary had undertaken a balance of the national interest against the interest of the citizens of California in deciding pursuant to Section 19 of the OCSLA not to adopt all of Governor Brown's recommendations as to tract deletions. (77a-81a).

The district court then proceeded, however, to enter summary judgment for California and the local governments on their CZMA claim. It found that the Department of the Interior's leasing of OCS tracts "would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical. . . ." (71a). The lower court refused to enter a judgment for the environmental groups on this claim, holding that they did not have standing to invoke the CZMA. (89a).

In ruling for California on its CZMA claim, the trial court did not identify any physical activity affecting the coastal zone which the Department of the Interior would conduct at the leasing or any other stage of the OCS Sale No. 53 project, nor did it identify any activities which OCS lessees might be expected to conduct immediately after obtaining their leases. Instead, in the trial court's view, the "direct" effects which triggered Section 307(c)(1) were the potential impacts that might arise at the later stages of the Sale No. 53 project, principally development/production when oil is first produced and transported to shore. (72a-73a). Since Interior had not determined that these potential impacts were consistent with the CCMP, the court issued a permanent injunction cancelling the sale of all CZMA-challenged tracts.[9]

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[9] The district court stayed its injunction to provide defendants an opportunity to apply to the Ninth Circuit for a stay pending appeal. On August 26, 1981, that court granted that stay.

2. The Ninth Circuit's Decision

Both sides filed cross-appeals, defendants seeking review of the district court's ruling under Section 307(c)(1) of the CZMA, plaintiffs challenging its judgment for defendants under NEPA and the OCSLA. The environmental groups also sought review of the district court's decision that they did not have standing to sue under the CZMA.

On August 12, 1982, the Ninth Circuit rendered its opinion. (1a). Adopting the district court's reasoning and its characterization of the "direct" effects of an OCS lease sale, the court of appeals held that the Secretary's decision to select particular tracts for leasing "established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased." (14a).

Although agreeing with the district court that Section 307(c)(1) thus required the Department of the Interior to make a consistency determination before proceeding with leasing, the court of appeals, unlike the district court, held that federal activities need be consistent with a state CZMA program only "to the maximum extent practicable." (21a, 24a). The Ninth Circuit based this construction of the CZMA upon its recognition that Congress in the "1953 Compromise" of the "Tidelands Oil Issue" had resolved the controversy between the States and the federal government as to ownership of the OCS and had declared "the paramountcy of the national interest." (25a).

The Ninth Circuit did not venture beyond this assertion of federal "paramountcy" to delineate how it might be upheld in specific future disputes with States seeking to apply their CZMA programs to OCS leasing. Stating that "verbal formulas cannot eliminate the necessity of examining each situation with care," the court noted that future disagreements between the States and federal agencies concerning consistency determinations would be subject to mediation within the Department of Commerce. (24a). Although the Ninth Circuit did not refer to them, applicable regulations defining mediation procedures, 15 C.F.R. § 930.43, make it clear that they are

voluntary, nonbinding, and, in serious disputes, merely a prelude to later federal litigation.[10]

After thus disposing of the merits of the CZMA dispute, the court held that environmental groups have standing under the Administrative Procedure Act (APA), 5 U.S.C. § 702, to institute litigation demanding the preparation of a consistency determination for OCS leasing.[11]

The Ninth Circuit affirmed the trial court's ruling for defendants under both NEPA and Section 19 of the OCSLA. As to the latter, it recognized the narrow scope of review open to a

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[10] The legislative history of Section 307(h), the mediation provision of the CZMA cited by the Ninth Circuit (25a), casts further doubt upon the Ninth Circuit's reliance on mediation as the congressionally-selected device to resolve disputes under Section 307(c)(1). Section 307(h) was added to the statute in 1976, four years after Section 307(c)(1) was enacted. In 1972, Section 307(b) contained a mediation provision, but it applied only to the development of CZMA programs, not to their implementation in specific consistency disputes. *See* Coastal Zone Management Act of 1972, P.L. No. 92-583, § 307(b), 86 Stat. 1280, 1285. Accordingly, at the time that Congress gave States the authority perceived by the Ninth Circuit to apply their CZMA programs to OCS leasing, it did not provide for any mediation with respect to application of those programs to federal activities.

The Ninth Circuit's reliance upon the Secretary of Commerce appeal provisions of Section 307(c)(3) of the CZMA, 16 U.S.C. § 1456(c)(3), as a device to resolve Section 307(c)(1) consistency disputes is equally erroneous. By its terms, that section applies only to disputes between private entities, who seek federal licenses or permits, and state CZMA agencies.

[11] The court stayed the district court's injunction cancelling the CZMA-disputed portion of the Santa Maria Basin sale, pending the Department of the Interior's preparation of a determination that its decision to lease the northern Santa Maria Basin tracts was consistent to the maximum extent practicable with the CCMP. The court of appeals left open the question whether it would uphold the district court's cancellation of the sale, if it were to disagree with the consistency determination. (26a).

court and upheld the Secretary of the Interior's rejection of the Governor's recommendations to delete the northern Santa Maria Basin tracts and his determination that the leasing of those tracts was in the national interest. (30a-31a).[12]

SUMMARY OF ARGUMENT

A long standing political controversy regarding the leasing of offshore lands was resolved definitively by Congress in 1953 when it passed the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*, and the original OCSLA. That legislation granted coastal states ownership of submerged lands within three miles (or in two instances three leagues) of their coasts, 43 U.S.C. §§ 1301(a), 1311(a), but reserved for the federal government proprietary control over the soil and seabed of the OCS outside this coastal zone, 43 U.S.C. §§ 1302, 1332(a). This Court has held that the Submerged Lands Act constituted an "exercise of a paramount national authority" over OCS lying beyond the three-mile limit. *United States* v. *Maine*, 420 U.S. 515, 525 (1975). Absent a clear statement of its intention to do so, it should not be assumed that Congress, in adopting the CZMA, intended to give the States any measure of authority over OCS leasing.

Not only does the CZMA contain no such clear statement, but when it is read with the OCSLA, it is clear that Congress did not contemplate that a state CZMA program would constrain the Secretary of the Interior's selection of OCS tracts for leasing.

The OCSLA specifies the role to be played by States at every stage of the OCS process. The OCSLA makes no provision for applying state CZMA programs to the selection of OCS tracts

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[12] On petitions for rehearing, plaintiffs argued that the Ninth Circuit had misconstrued the term "maximum extent practicable" in Section 307(c)(1) when it rejected their claim that the Department of the Interior must conform to a state's interpretation of its CZMA program. On November 10, 1982, the Ninth Circuit denied plaintiffs' petitions for rehearing without opinion.

for leasing, but instead permits Governors to make recommendations as to such selections, while reserving "final" authority for the Secretary of the Interior to accept or reject those recommendations. The OCSLA provides for the application of state CZMA programs only at the later exploration and production/development stages of an OCS project.

Like the OCSLA, the CZMA is silent as to the application of CZMA programs at the leasing stage of an OCS project, while explicitly providing for their application at the exploration and production/development stages. Moreover, the plain meaning of the terms of Section 307(c)(1) that only activities "directly affecting" coastal zones are subject to CZMA programs demonstrates that the Secretary of the Interior's selection of OCS tracts is not subject to that section.

Such OCS tract selection does not "directly affect . . ." a state's coastal zone. The effects upon state coastal zones associated with OCS projects instead arise from the actions of OCS lessees, who, acting pursuant to federal licenses or permits, commence the exploration and production/development stages of an OCS project. These physical impacts upon a state's coastal zone, which cannot occur until a state exercises CZMA review under Section 307(c)(3)(B), are not "direct" effects of OCS leasing itself.

Consistent with the plain meaning of Section 307(c)(1), the legislative history of that provision shows that Congress, in 1972 when it adopted that section, gave no indication whatever that it would apply to OCS leasing. Similarly, when Congress in 1976 specifically amended Section 307(c) to apply to OCS projects, it rejected a proposal that the issuance of OCS leasing be subject to state CZMA programs, and instead provided only that the later exploration and development/production stages of an OCS project would be subject to Section 307(c). Nothing asserted by Congressional Committees in 1980 as to the purported scope of the 1972 version of Section 307(c)(1) is of any pertinence in this case, since in 1980 Congress did not even attempt to amend Section 307(c).

Finally, policy considerations do not support the construction of the CZMA embraced by the lower courts. Application of the CZMA to OCS leasing in the manner envisioned below would erect substantial litigation impediments to the development of OCS energy resources, thus contravening the basic purpose of the 1978 OCSLA amendments to promote the swift, orderly and efficient exploitation of the oil and gas resources of the OCS.

ARGUMENT

I. THE 1953 COMPROMISE OF THE TIDELANDS OIL ISSUE SHOULD NOT BE UNDERMINED BY A CONSTRUCTION OF THE CZMA VESTING AUTHORITY IN STATES TO APPLY THEIR CZMA PROGRAMS TO CHALLENGE THE SECRETARY OF THE INTERIOR'S SELECTION OF OCS TRACTS FOR LEASING.

The Ninth Circuit recognized that a full consideration of the language and purposes of the OCSLA and CZMA leads to the conclusion that the CZMA

> "does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*."
>
> "[S]uch authority [to determine consistency] must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate. To hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of Congress, weighs too lightly the interests of the Nation against that of a state." (21a, emphasis in original).

In so construing the CZMA, the Ninth Circuit properly referred to the so-called "1953 Compromise" of the "Tidelands Oil Issue," which granted coastal states ownership of submerged lands within three miles (or in two instances three leagues) of their coasts, 43 U.S.C. §§ 1301(a), 1311(a), but reserved for the federal government exclusive proprietary

control over the soil and seabed of the OCS outside this zone, 43 U.S.C. §§ 1302, 1332(a). (22a-23a). The court recognized that the CZMA was explicitly conditioned so as not to change this division of authority between the state and federal governments over OCS federal lands, citing Section 307(e) of the CZMA, 16 U.S.C. § 307(e). (23a).

The Ninth Circuit's perception of the significance of the 1953 Compromise of the Tidelands Oil Issue was plainly correct. In rejecting the claims of the eastern seaboard States to ownership of the OCS, this Court stressed that the Submerged Lands Act of 1953, 43 U.S.C. § 1301, constituted a "further exercise of paramount national authority" over the OCS lands lying beyond the three-mile limit. *United States* v. *Maine*, 420 U.S. 515, 525 (1975). It went on to note that the second phase of the 1953 Compromise, enactment of the original OCSLA, constituted an "emphatic" implementation by Congress of "its view that the United States has paramount rights to the seabed beyond the three-mile limit . . . ." 420 U.S. at 525. The Court has in recent cases reiterated these principles. *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 479 n.7 (1981); *Maryland* v. *Louisiana*, 451 U.S. 725, 752-53 n.26 (1981).

Since the 1953 Compromise so clearly left the States with no decisional authority as to the selection of OCS tracts for leasing, it should be assumed that Congress, in adopting the CZMA, did not intend to give the States any measure of authority over OCS leasing, absent a clear statement of its intention to do so. *See Ruckelshaus* v. *Sierra Club*, ___ U.S. ___, 51 U.S.L.W. 5132 (July 1, 1983); *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 285 (1973); *Industrial Union Dept. AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 645-46 (1980); *Illinois* v. *General Electric Co.*, 683 F.2d 206, 215-16 (7th Cir. 1982). The Ninth Circuit correctly read the CZMA as lacking such a clear statement.

Where the Ninth Circuit erred in this case was in determining that Congress chose to preserve ultimate federal control over the OCS by adopting the "maximum extent practicable"

limitation upon the consistency required by Section 307(c)(1). The Ninth Circuit itself recognized the imprecision of this term. It conceded that the limits of conformity with a state plan implied by it "cannot be precisely delineated," so that it would be necessary to "examine each situation with care and sensitivity to the concerns of the state and the nation," in future cases challenging the Secretary's selection of particular OCS tracts. (24a).

The Ninth Circuit's selection of the "maximum extent practicable" qualification to Section 307(c)(1) as the wavering line of demarcation between state and federal authority over the selection of OCS tracts for leasing cannot be reconciled with the court's recognition that Congress resolved the Tidelands Oil Issue so as to give the federal government "exclusive proprietary control over 'the soil and seabed of the Continental Shelf' outside this three-mile zone." (23a). Obviously, requiring the federal government to select OCS tracts for leasing in a fashion that is in any degree consistent with state CZMA programs confers some proprietary control upon the States.

Moreover, as this Court recognized in *United States* v. *Maine*, 420 U.S. at 527, "a principal purpose of [the 1953 Compromise] was to resolve the 'interminable litigation' arising over the controversy of the ownership of the lands underlying the marginal sea." Given the amorphous nature of state CZMA programs, which courts have felt obliged to leave intact in the light of the equally vague provisions of the CZMA, *see American Petroleum Institute* v. *Knecht*, 456 F. Supp. at 931, and the uncertain contours, as recognized by the Ninth Circuit itself, of the phrase "maximum extent practicable,"[13] the lower

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[13] In a closely related context, the D.C. Circuit recognized that the "maximum extent practicable" qualification of the Secretary of the Interior's duties with respect to OCS leasing reflected the difficult burden that he must shoulder in balancing non-quantifiable environmental and social costs against potential OCS resource benefits.

court's construction of the CZMA would replace one form of "interminable [OCS] litigation" with another.[14]

As we will show, there is no basis in the CZMA or OCSLA for believing that Congress, at any time when it originally enacted those statutes or subsequently amended them, contemplated that the Secretary of the Interior's selection of OCS tracts for leasing would in any respect be influenced by state CZMA programs. Had the Ninth Circuit, therefore, pursued

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California v. Watt, 668 F.2d 1290, 1317 (D.C. Cir. 1981), *interpreting* Section 18(a)(3) of the OCSLA, 43 U.S.C. § 1344(a)(3).

[14] As this Court was advised in the briefing of the petitions for certiorari, the Department of the Interior has prepared consistency determinations pursuant to Section 307(c)(1) for all OCS lease sales, since the Ninth Circuit rendered its decision in this case. (*See* Fed. Petn. in No. 82-1326 at 19 n.18). Several States have already instituted litigation challenging the adequacy of these consistency determinations by arguing that they did not give adequate weight to purportedly binding provisions of state CZMA programs. In Conservation Law Foundation v. Watt, 560 F. Supp. 561 (D. Mass 1983), *appeals pending*, No. 83-1258 (1st Cir.), the State invoked a policy of its program, which required it to "accommodate exploration, development and production of offshore oil and gas resources while minimizing impacts on the marine environment," as a basis for challenging the Secretary of the Interior's selection of 57 (out of 488) tracts included within an OCS lease sale off Massachusetts. The district court enjoined the Secretary of the Interior's leasing of these challenged tracts on the ground that the consistency determination had not sufficiently explained the Department of the Interior's reasons for rejecting the state's construction of its CZMA program. 560 F. Supp. at 578.

Subsequently, suits were filed by New York, Maryland, and Virginia against OCS Lease Sale No. 76 (Mid-Atlantic) mounting similar challenges under their CZMA programs to the Secretary of the Interior's selection of OCS tracts for leasing. New York v. Watt, No. 83 Civ. 1523 (S.D.N.Y.); Maryland v. Watt, No. 83-1180 (D. D.C.) *(dismissed as moot)*; Virginia v. Watt, No. 83-284-N (E.D. Va.) *(dismissed as moot)*.

the implications of its perception that Congress should not lightly be presumed to have undone the political compromise of the Tidelands Oil Issue, it would have been driven to the conclusion that Section 307(c)(1) does not apply to the selection of OCS tracts for leasing.

Indeed, that court would have reached this conclusion had it simply recognized that its obligation was to abide by the plain meaning of the explicit terms of the applicable statutes. *See Griffin* v. *Oceanic Contractors, Inc.*, ___ U.S. ___, 102 S. Ct. 3245, 3250 (1982).[15]

II. THE OCSLA DOES NOT CONTEMPLATE STATE INVOCATION OF CZMA PROGRAMS TO INFLUENCE THE SECRETARY OF THE INTERIOR'S SELECTION OF OCS TRACTS FOR LEASING.

Resolution of the issue presented in this case requires scrutiny of two statutory schemes: the CZMA and OCSLA. In this respect, this case is no different than many others where Congress has enacted two or more statutes bearing upon a particular activity. However, in this case, Congress has provided with unusual clarity how these two schemes are intended to relate to each other.

Since the 1978 amendment of the OCSLA is the most comprehensive, most specifically directed toward OCS leasing, and most recently amended of the two relevant statutes, conventional principles suggest that its terms should be given initial scrutiny in deciding the issue presented here. *See* p. 32, *infra*. Moreover, since it is the OCSLA which carries forward the terms of the 1953 Compromise in fixing the bounds of state

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[15] *See also* Bowsher v. Merck & Co., ___ U.S. ___, 103 S. Ct. 1587, 1591-92 (1983); Watt v. Energy Action Educational Foundation, 454 U.S. 151, 162 (1981); CBS v. FCC, 453 U.S. 367, 377-79 (1981); United States v. Turkette, 452 U.S. 576, 580 (1981); American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490, 508 (1981); Howe v. Smith, 452 U.S. 473, 488 (1981).

and federal authority over OCS leasing, the Court should look first to its provisions in determining whether Congress has clearly stated an intention to modify that compromise.

A. The OCSLA Specifies In Detail The Role To Be Played By States At Every Stage Of The OCS Process And Makes No Provision For Applying CZMA Programs To The Selection Of Tracts For Leasing.

The Ninth Circuit, like the district court, justified its construction of Section 307(c)(1) of the CZMA as extending to OCS leasing on the basis that a major purpose of that statute was to encourage cooperation between the federal and state governments and that "to effectuate this purpose, the state must be permitted to become involved in an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone." (15a). The court rejected defendants' purportedly "narrow" construction of Section 307(c)(1) as not extending to leasing on the basis that it would "preclude this early involvement."[16] In so approaching the issue in this case and assuming that federal-state cooperation had to be premised on an expansive construction of Section 307(c)(1), the Ninth Circuit ignored the OCSLA's explicit provisions for state involvement in the OCS process.

One of the basic purposes motivating congressional amendment of the OCSLA in 1978 was to

> "assure that states . . . which are directly affected by exploration, development, and production of oil and natu-

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[16] This Court has recently rejected an argument that "a general policy of encouraging federal/state cooperation" justifies ignoring the specific terms of a federal statute. Illinois v. Abbott & Associates, Inc., ___ U.S. ___, 103 S. Ct. 1356, 1364 (1983). Although endorsing "the general goals of enhancing federal/state cooperation," the Court ruled that such goals "do not authorize us to add specific language that Congress did not include in a carefully considered statute." *Id.* at 1364.

> ral gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the [OCS]." 43 U.S.C. § 1802(6).

To achieve this end, Congress designed appropriate state participation for every stage of the OCS process, and provided for state involvement in the selection of tracts for leasing that is more limited than that discerned in the CZMA by the lower courts.[17]

1. The Five-Year Leasing Program Stage—Section 18

"Affected states" within the meaning of Section 201(f) of the OCSLA, 43 U.S.C. § 1331(f)—*i.e.*, those "in which there is a substantial probability of significant impact . . . resulting from the exploration, development, and production of oil and gas anywhere on the [OCS]"—are given a role in the earliest phase of the OCS process, when the Secretary of the Interior adopts a five-year OCS leasing schedule describing the size, timing and location of future lease sales. *See* Section 18(a) of the OCSLA, 43 U.S.C. § 1344(a). At this point, affected States are permitted to submit comments to the Secretary with respect to his leasing program and to request its modification. The Secretary is, in turn, directed to reply in writing to such requests, stating his reasons for agreeing or disagreeing with them, and must submit his correspondence with the governors to Congress for its scrutiny. 43 U.S.C. § 1344(c) & (d).[18]

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[17] This approach to state involvement in OCS decision-making was carefully tailored by Congress. As Representative Murphy, sponsor of the House bill, emphasized:

> "[This] is a long, detailed and well-considered bill. It is the result of 3 years of extensive hearings, in which the select committee heard more than 375 witnesses and compiled a hearing record totaling more than 10,000 pages, and months of markup, in which the committee considered hundreds of amendments. It is a bill which, if enacted, can make a profound contribution to the solution of the Nation's energy crisis and do so in a manner that takes into account the needs of our states and the protection of our marine and coastal environment." 124 Cong. Rec. 816 (1978).

[18] Affected States or other parties in interest are also empowered to institute judicial review proceedings in the D.C. Circuit to chal-

The promulgation of the Secretary's five-year leasing program is the "first link" in the OCS process, as the Ninth Circuit used that term, inasmuch as no lease sale can be conducted within the ensuing five years unless it is identified on that program. 43 U.S.C. § 1344(d)(3). Nonetheless, the D.C. Circuit rejected California's claims that the Secretary had to consult California's program prior to including OCS Sale No. 53, on his program. *California* v. *Watt*, 668 F.2d 1290, 1310-11 (D.C. Cir. 1981). Instead, that court held that States are limited to participation through the commenting process specifically provided in Section 18(c) & (d) of the OCSLA, at the five-year leasing program stage of the OCS process.

2. The Leasing Stage—Section 19

"Affected states" are also assigned a specific role at the leasing stage of the OCS process, when the Secretary of the Interior selects particular tracts for leasing. Section 19(a) of the OCSLA, 43 U.S.C. § 1345(a), provides States with the "opportunity to participate in policy and planning decisions relating to management of the resources of the [OCS]," 43 U.S.C. § 1802(6), by permitting governors to submit "recommendations" to the Secretary regarding the "size, timing, or location" of OCS lease sales.

The Secretary is directed to give greater weight to these "recommendations" of governors than to their "comments" on the five-year leasing program. Under Section 19(c) of the statute, he must determine whether these recommendations "provide for a reasonable balance between the national interest and

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lenge the Secretary's five-year OCS leasing program. In California v. Watt, 668 F.2d 1290, 1326 n.176 (D.C. Cir. 1981), the court rejected California's challenge to the inclusion of OCS Sale No. 53 in Secretary Andrus' 1980 leasing program. Moreover, on July 5, 1983, that court handed down its opinion rejecting California's, other states', and other parties' attacks upon Secretary Watt's 1982 five-year OCS leasing program. California v. Watt, No. 82-1822, (D.C. Cir.).

the well-being of the citizens of the affected state." 43 U.S.C. § 1345(c). If so, the Secretary is directed to accept them. Moreover, the Secretary must communicate to the governor in writing his reasons for accepting or rejecting the governor's recommendations.

While thus ensuring that gubernatorial recommendations as to the size, timing and location of leasing will be accepted by the Secretary, if they provide for the appropriate balance set forth in the Act, Congress mandated that the Secretary's determination of the "reasonable balance between the national interest and the well-being of the citizens of the affected states shall be final," subject to a limited "arbitrary or capricious" standard of review. 43 U.S.C. § 1345(d).

In so defining the states' role and the Secretary's ultimate balancing responsibility, Congress made no provision for the application of state CZMA programs in connection with the Secretary's selection of tracts for leasing. Manifestly, Congress did not contemplate that a state agency, like the CCC, could through its own assessment of the national interest contradict the Secretary's decision. To the contrary, the framers of the 1978 Amendments to the OCSLA stressed repeatedly that no veto authority for the States was envisioned:

> "The intent of the committee is to insure that the Secretary give thorough consideration to the voices of responsible regional and local State officials in planning OCS leasing and development. The committee did not believe that any State should have a veto power over OCS oil and gas activities." S. Rep. No. 284, 95th Cong., 1st Sess. 78 (1977).

Representative Murphy, chief sponsor of the bill in the House, similarly explained:

> "The conference report [through OCSLA § 19] would open Interior's decisionmaking process so that relevant outsiders—and in particular, State governments and through states, local government—may present their views and must be heard. They would not have a veto—only an opportunity to present their views and assurances

that those views will be considered." 124 Cong. Rec. 26778 (1978).[19]

Recognition of the primacy of the Secretary's authority at the leasing stage implied by Section 19 by no means entitles a Secretary of the Interior to proceed with OCS leasing in disregard of state CZMA programs. As the record in this case

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[19] Throughout this litigation, California has failed to produce any OCSLA legislative history reflecting a congressional intent to permit states to apply their CZMA programs to control the Secretary's selection of tracts for leasing. It has identified one footnote in a House Report in which the Committee expressed its awareness that "under the [CZMA] . . . certain activities including lease sales and approval of development and production plans must comply with 'consistency' requirements. . . ." H. Rep. 590, 9th Cong., 1st Sess. 153 n.52 (1977). This footnote is plainly an insufficient foundation for California's argument that Section 307(c)(1) of the CZMA, not Section 19 of the OCSLA, is the vehicle chosen by Congress for state input into the Secretary's tract-selection decision for two separate reasons.

First, such a meager indication of congressional intent cannot overcome the focused statement of both the House and Senate Committees and principal sponsors of the 1978 amendments to the OCSLA that the Secretary of the Interior had to do no more than consider the views of states through the Section 19 process.

Second, it is conceivable that federal agencies themselves could conduct physical activities associated with lease sales or that others acting on their behalf could do so as part of the leasing stage of an OCS project, which would permit limited state CZMA consistency review. Indeed, prior to the Ninth Circuit's decision in this case, the Department of the Interior did at least once prepare a consistency determination for an OCS sale because the lease stipulations required successful bidders to construct gravel islands immediately beyond the Alaska coastal zone in a fashion that might affect Alaska's land or water uses. (In this case, by contrast, Interior canvassed its pre-leasing activities and determined that none would physically impact the coastal zone. (*See* p. 8, *supra*)). Even assuming the footnote to the House Report upon which California relied envisioned this type of limited state CZMA consistency review at the leasing

shows,[20] gubernatorial recommendations with respect to the "size, timing and location" of leasing are normally accompanied by a state CZMA agency's comments. The Secretary thus has before him when he undertakes the balancing contemplated by Section 19(c) & (d) not only the policy preference expressed by the governor, but also the state's construction of its CZMA program. If that program contains provisions bearing upon the well-being of the citizens of the affected State, the Secretary is obliged to consider any that are brought to his attention in balancing that interest against the national interest.

3. The Exploration Stage—Section 11

Recognizing that States are first "directly affected" by the exploration, production and development stages of the OCS process, 43 U.S.C. § 201(f), the OCSLA does specifically refer to the application of CZMA programs at the exploration stage of an OCS project. It is at this point that OCS activities begin to have even the potential for actual impact upon the marine environment or the coastal zone.[21] At exploration, lessees are required to file detailed plans with the Department of the Interior describing when, where and how they intend to commence exploratory activities, most notably exploration drilling.

Recognizing the much greater specificity of an OCS project that emerges after tracts have been bid upon and exploration

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stage of an OCS project, there is no warrant for assuming that Congress silently harbored the view that States possessed the far broader authority routinely to apply their CZMA programs to challenge the Secretary's selection of OCS tracts for leasing.

[20] *E.g.*, Letter of Governor Brown to Secretary Andrus, Dec. 24, 1980 (C.R. 85; A.R. 224w); Letter of Governor Brown to Secretary Andrus, April 7, 1981 (C.R. 85; A.R. 406w).

[21] *But see* State of Alaska v. Andrus, 580 F.2d 465, 486 n.65 (D.C. Cir.), *vacated in part as moot*, 439 U.S. 922 (1978), stressing the limited nature of the environmental impacts associated with exploration.

plans have been filed,[22] Congress explicitly provided for state CZMA input into the OCS process at the exploration stage. Thus, Section 11 of the OCSLA, 43 U.S.C. § 1340, governing exploration specifically provides that

> "the Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a state with [an approved CZMA program], unless the state concurs . . . with the consistency certification accompanying such plan pursuant to [section 307(c)(3)(B) of the CZMA] . . . or the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such act." 43 U.S.C. § 1340(d).

4. The Production Stage—Section 25

Virtually all of the impacts referred to by the lower courts to support their conclusion that OCS leasing directly affects a state's coastal zone—pipeline construction, spills from platforms, migration of labor into the area (72a-73a)—are potential impacts associated with the development/production stage of an OCS project, which does not occur until years after leasing.[23] In many cases, this stage is never reached since exploration fails to discover any commercial quantities of oil or gas in the leasing area; in virtually no case are all portions of an area that is made available for leasing later committed to development and production.

It is at the final production/development stage that the size and location of oil fields are delineated, pipeline or tanker

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[22] It is not always necessary to explore every OCS tract that has been leased, since exploration activities on adjoining tracts can provide relevant information about those which were unexplored. This is particularly true when initial exploration is unsuccessful. For example, although 63 tracts were acquired in 1979 at OCS Sale No. 42 (North Atlantic) at a cost of more than $800 million, only eight exploration wells, all dry holes, have been drilled. *See* Conservation Law Foundation v. Watt, 560 F. Supp. at 565-66.

[23] Here, the EIS projected that a 1981 lease sale would lead to development/production no earlier than 1986. EIS at 1-16.

routes for transporting the oil to shore are laid out, on-shore transshipment points are identified, and destination refineries are described. Courts adjudicating prior OCS cases have noted these very facts in excusing the need, at the leasing stage, for speculation under NEPA about pipeline routes and other similar matters. *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1378-79 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).[24]

Recognizing both the greater potential of environmental impacts associated with production/development and the greater information available at that stage, Congress in the 1978 amendments to the OCSLA adopted Section 25, 43 U.S.C. § 1351, to provide for review of development/production plans. In an area, such as the Santa Maria Basin, which has had no previous OCS development, the Secretary of the Interior is required to find that approval of at least one development and production plan is a "major federal action" and thus to prepare a new impact statement under NEPA. 43 U.S.C. § 1351(e). He is also required to conduct a public hearing and is directed to "require modification of a plan if he determines that the lessee has failed to make adequate provision in such plan for safe operations on the lease area or for protection of the human, marine, or coastal environment." 43 U.S.C. § 1351(h)(1). The Secretary is explicitly directed to disapprove a plan, if he

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[24] In that case the Second Circuit held that the requirements of NEPA, which extend to both direct and indirect effects of a proposed major federal action, *see* pp. 36-37, *infra*, did not compel the Secretary of the Interior, at the leasing stage of an OCS project, to address the very issue which the Ninth Circuit held must be considered under the more limited "directly affecting" standard of the CZMA—the exercise by particular state and local jurisdictions of "regulatory powers and procedural requirements that could be invoked to restrict pipelines and landfalls, onshore routing, activities, operations, and effects." 562 F.2d at 1376. The court agreed with the federal defendants and industry intervenors in that case that projecting pipelines and the like at the leasing stage "would amount to a meaningless exercise." 562 F.2d at 1378.

determines that it cannot be modified to permit operations in accordance with statutorily-described factors. 43 U.S.C. § 1351(h)(1)(D).

In the legislative history underlying the 1978 amendments to the OCSLA, Congress described its reasons for adopting Section 25:

> "[It] is intended to provide the mechanism for review and evaluation of, and decision on, development and production in a leased area, after consultation and coordination with all affected parties.
>
> "The committee considers this one of the most important provisions of the 1977 amendments. It provides a means to separate the Federal decision to allow private industry to explore for oil and gas from the Federal decision to allow development and production to proceed if the lessee finds oil and gas." H.R. Rep. No. 95-950, 95th Cong., 1st Sess. 164 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 1450, 1570.

Congress went on to describe the reasons for this separation in a fashion that contradicts the Ninth Circuit's position that all of the uncertainties associated with the later stages of an OCS project must be resolved at the leasing stage through CZMA-based litigation:

> "The failure to have such a mechanism in the past has led to extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known." *Id.*

As with every other stage of the OCS process, Congress specifically provided for state involvement at the production/development stage. The Secretary of the Interior must submit a lessee's application for approval of a development/production plan to state governors, who have the power to make "recommendations" which the Secretary "shall" accept, unless he finds that the national interest requires otherwise. 43 U.S.C. § 1351(h), § 1345(a)-(d). In terms which echo those of Section 11 as it applies to exploration (*see* p. 28, *supra*), Section 25 also requires the Secretary of the Interior to assure

that the lessee has certified consistency with respect to affected State CZMA programs or otherwise has secured Secretary of Commerce approval for the lessee's activities. 43 U.S.C. § 1351(h)(1)(B).

B.The Lower Courts Erred In Construing The CZMA To Give States A Role In The OCS Leasing Process That They Were Not Provided By The OCSLA.

Another panel of the Ninth Circuit previously held that the OCSLA constitutes a "comprehensive scheme of regulation for the OCS." *California* v. *Kleppe*, 604 F.2d 1187, 1192 (9th Cir. 1979). Other appellate courts have recognized in a variety of ways the comprehensive responsibilities cast upon the Secretary of the Interior by that statute. *See Massachusetts* v. *Andrus*, 594 F.2d 872, 892 (1st Cir. 1979) (describing the Secretary's balancing responsibilities in selecting OCS tracts for leasing); *County of Suffolk* v. *Secretary of the Interior* 562 F.2d at 1378 (recognizing the retained authority of the Secretary to regulate post-leasing stages of the project); *Superior Oil Co.* v. *Andrus*, 656 F.2d 33, 36 (3d Cir. 1981) (characterizing the OCSLA as " 'complete, independent and alone controlling' in the sphere of the [OCS] lands" when addressing the Act's venue provisions); *Village of Kaktovik* v. *Watt*, 689 F.2d 222, 225-26 (D.C. Cir. 1982) (recognizing the primary purpose of the OCSLA as encouraging the development of our offshore oil and gas resources).

In this comprehensive scheme, Congress made explicit provision for state input into the OCS process at every stage from the five-year leasing schedule to final production and development. At no point in doing so did Congress indicate that it was undoing any element of the 1953 Compromise of the Tidelands Oil Issue. To the contrary, States were limited to "comments" or "recommendations" with respect to Secretary of the Interior's planning or leasing decisions relating to federal disposition of OCS lands, and were permitted to apply their CZMA programs only to lessees exploration and development/production plans when confronted with specific land or water use issues.

Since Congress in the 1978 amendments to the OCSLA painstakingly defined the roles which States were to play in the OCS process, pursuant to its stated purpose of providing them with "an opportunity to participate in policy and planning decisions relating to management of the resources of the [OCS]," 43 U.S.C. § 1802(6), the lower courts erred in interpreting prior, general legislation which makes no reference whatever to OCS leasing in a manner that is inconsistent with the OCSLA. *See NLRB* v. *Allis-Chalmers Manuf. Co.*, 388 U.S. 175 (1967); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228 (1957).[25]

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[25] The 1978 amendments to the OCSLA contain a general provision that nothing in them "shall be construed to amend, modify, or repeal any provision of the [CZMA], [NEPA], the Mining and Mineral Policy Act of 1970 or any other Act." 43 U.S.C. § 1866(a). The Ninth Circuit referred to this provision of the statute in reaching the conclusion that Section 307(c)(1) of the CZMA could properly be applied to OCS leasing. (20a). This provision, however, is of no significance to the issues presented in this case.

First, petitioners do not urge that the OCSLA of 1978 amended, repealed or modified the CZMA. Our position is that, given the 1953 OCSLA which assigned exclusive jurisdiction to the federal government over OCS leasing and the failure of the 1972 CZMA or its 1976 amendments to in any way modify this congressional determination, there was never any basis for construing the CZMA as extending to the selection of OCS tracts for leasing. The 1978 OCSLA merely carries forward the principles of federal paramountcy over the OCS and provides appropriate means for state input into the OCS process consistent with such federal paramountcy.

Second, the CZMA contains a comparable savings clause which provides that nothing contained within it in any way lessens the federal governments rights under the OCSLA. *See* p. 39, *infra*.

III. THE CZMA DOES NOT PERMIT STATES TO APPLY THEIR PROGRAMS TO CONTROL THE SECRETARY OF THE INTERIOR'S SELECTION OF OCS TRACTS FOR LEASING.

The specific terms of the CZMA fit precisely with those of the OCSLA in applying the CZMA to the OCS process. Corresponding with the silence of Sections 18 and 19 of the OCSLA as to the application of CZMA programs at the five-year leasing program and leasing stages of the OCS process, Section 307(c)(1) makes no explicit reference to OCS leasing.

Sections 11 and 25 of the OCSLA governing exploration and production/development respectively, find their counterpart in Section 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B), of the CZMA. That section of the Act specifically provides that all activities, to the extent they affect land or water uses in a state's coastal zone, which are described in a plan of exploration or development/production filed by an OCS lessee with the Department of the Interior, must be conducted in a manner that is consistent with a state's CZMA program.

Moreover, as we will show, the legislative histories of both Section 307(c)(1) and 307(c)(3)(B) confirm the inference drawn from the face of those statutes that Congress envisioned state CZMA programs would apply to the exploration and development/production stages of an OCS project.

A. The Ninth Circuit's Construction Of Section 307(c)(1) Is Inconsistent With The Plain Meaning Of The Terms Of The CZMA.

Section 307(c)(1) applies only to federal "activities directly affecting" a state's coastal zone. OCS leasing is not such an activity.[26]

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[26] Although petitioners did not argue the point in the Ninth Circuit, we did contend in the district court that OCS lease sale decisions are not "activities" within the meaning of Section 307(c)(1). We argued that the term "activity" as used in the CZMA contemplates actual physical activities that could affect the coastal zone—such as the

At the leasing stage of the OCS process, the Department of the Interior itself undertakes no action having any physical impact upon a coastal zone and normally authorizes no actions by lessees which are likely to have any such impacts. As the D.C. Circuit held in *North Slope Borough* v. *Andrus*, 642 F.2d 589, 593-94 (D.C. Cir. 1980):

> "[a]s provided in the [OCSLA], the lease sale itself is only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to implementation of each of the major stages: leasing, exploring, producing.
>
> ". . . Once the Secretary accepts 'high' bids and executes leases, lessees are permitted by federal law, Department

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siting, construction, expansion, or operation of equipment or facilities; the actual transportation, conversion, treatment or transfer of oil and gas; the exploration for or development and production of such resources. *See* 16 U.S.C. §§ 1453(4) & (12) so defining "coastal energy activity" and OCS "energy activity." *See also* 16 U.S.C. § 1456(c)(3)(A) requiring applicants for a "federal license or permit to conduct an activity affecting land or water uses in the coastal zone" to certify that the proposed activity complies with the state's CZMA program.

We also argued that Sections 307(c)(2) and 307(d), 16 U.S.C. § 1456(c)(2) & (d), which impose consistency requirements upon federal agencies undertaking "any development project in the coastal zone" and upon "[f]ederal agencies . . . approv[ing] proposed projects [pursuant to applications submitted by State and local governments]" would be rendered superfluous, if a mere federal decision, which represent the "first link" in a chain of events ultimately leading to impacts upon the coastal zone, constituted a federal "activity." For every federal development project is preceded by such a federal decision, as is all federal funding of state or local projects.

Since these arguments were not placed before the Court of Appeals, we do not offer them here as an independent basis for reversing its opinion. However, this Court should at least be aware of the prior position we have taken on this issue.

regulations and lease stipulations to engage only in 'preliminary activities.' " (Emphasis and footnote omitted.)

Here, neither the district nor appellate courts found that any environmental impacts were expected during the leasing stage of OCS Sale No. 53 on the California coastal zone. Instead, both courts relied entirely upon the potential environmental impacts of activities conducted later by OCS lessees, principally at the development/production stage of an OCS project, to identify the alleged "direct" effects of OCS leasing. This approach to the statute reads the term "directly" out of the CZMA, since it labels any effect which might arise during the 20-year life of an OCS project as a "direct" effect of leasing itself. This approach to statutory construction has recently been disapproved by this Court.

In *Bowsher* v. *Merck & Co., Inc.*, ___ U.S. ___, 103 S. Ct. 1587 (1983), this Court construed the phrase "directly pertain to . . . the contract," in determining the authority of the General Accounting Office (GAO) to subpoena documents. The Court soundly rejected GAO's contention that the "directly pertinent" qualification did not impose a limitation upon its authority. The Court held that the insertion of "the word 'directly' before the word 'pertinent' " necessarily was meant as such a limitation. 103 S. Ct. at 1592. It rejected GAO's contrary contention by relying upon the "settled principle of statutory construction that we must give effect, if possible, to every word of the statute," 103 S. Ct. at 1593, citing *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, ___ U.S. ___, 102 S. Ct. 3014, 3022 (1982).[*]

The Ninth Circuit committed the very error which undermined GAO's position in *Bowsher*, when it adopted a construc-

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[*] *Cf.* E.E.O.C. v. Wyoming, ___ U.S. ___, 103 S. Ct. 1054, 1062-63 (1983), where this Court found that applying the Age Discrimination Employment Act to States would not "directly impair" their ability to structure their operations, even though the application of that statute to the States might in the future impose additional costs upon them.

tion of Section 307(c)(1) of the CZMA which failed to give any meaning to the term "directly." Had that court adopted any of the conventional definitions of the term acknowledged by the district court (66a-67a)—"simultaneously," "without any intervening agency or instrumentality of a determining influence," "without any intermediate step, without a moment's delay; at once, immediately"—it would have been led to a different construction of Section 307(c)(1). Under any of these definitions, CZMA analysis, at the leasing stage of an OCS project, is not required for exploration or development/production impacts which can only arise at subsequent stages.

The district court and the court of appeals identified the environmental impacts which they described as "direct effects" of OCS leasing by examining the EIS for Sale No. 53 and the SID which was based on that EIS. However, NEPA, the statute which required preparation of the EIS, itself shows the lower court's error. NEPA requires analysis of "major federal actions significantly affecting the . . . environment," 42 U.S.C. § 4332(2)(c), not merely those "directly affecting" the environment. Thus, NEPA regulations require an impact statement to discuss both "direct" and "indirect" effects of a major federal action. 40 C.F.R. § 1502.16 (1980). However, they define those terms in a manner which contradicts the Ninth Circuit:

> " 'Effects' include:
>
> "(a) Direct effects, which are caused by the action and occur at the same time and place.
>
> "(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8.[25]

Obviously, the exploration and development/production impacts relied upon by the lower courts in applying Section

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[25] Courts applying NEPA have drawn the same distinction between direct and indirect effects. *See* Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1322 (8th Cir. 1974); North Dakota v. Andrus, 483 F. Supp. 255, 260 (D. N.D. 1980).

307(c)(1) to OCS leasing are, at best, "indirect effects" of leasing.[29]

B. The Legislative History Of The CZMA Contradicts The Lower Court's Interpretation Of Section 307(c)(1).

Avoiding the language of the statute—indeed condemning defendants' arguments based upon it as "verbal table thumping" that was a "subterfuge in the present case" producing "an unreasonable result" (67a)—the district court, whose reasoning the court of appeals affirmed on this point (15a-17a), rested its construction of Section 307(c)(1) in substantial measure upon the Act's so-called 1980 legislative history. However, the only the relevant legislative histories, that of the 1972 Congress when Section 307(c)(1) was enacted and of the 1976 Congress when Section 307(c)(3) was amended to refer to OCS operations, squarely contradict the lower courts' interpretation of Section 307(c)(1).

1. Section 307(c)(1)—The 1972 History.

When Section 307(c)(1) was first proposed, it clearly did not apply to OCS leasing decisions. Both the Senate and House bills required Section 307(c)(1) consistency only for "[f]ederal agencies conducting or supporting activities in the coastal zone."[30] In confining State CZMA authority to federal activities "in the coastal zone" and defining that phrase as covering essentially the same area as that over which States were given

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[29] As we discussed above, p. 29 n.24, *infra*, the Second Circuit held that even the broad NEPA requirements for discussing direct and indirect effects of federal actions do not force the Department of the Interior to speculate, at the leasing stage, about the placement of pipelines and other coastal zone impacts which the lower courts here found to be "direct" effects of OCS leasing.

[30] S. Rep. No. 753, 92d Cong., 2d Sess. 54 (1972) (Section 314(b)(1) of S. 3507) (emphasis added); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 5 (1972) (Section 307(c)(1) of H.R. 14146) (emphasis added).

mineral leasing authority by the Submerged Lands Act, Congress was acting in accord with principles that had been settled by the 1953 Compromise.

Confirming the inferences to be drawn from this background, debate on the floor of the Congress prior to adoption of these bills clearly revealed a congressional intent not to extend state authority to the federal OCS. For example, in the Senate, it was proposed that States should have CZMA authority to deal with oil pollution which might result from the establishment of deep water ports at "sites outside the 3-mile territorial limit" which would not be "in the coastal zone." 118 Cong. Rec. 14183-84 (1972). Senator Hollings, the sponsor of the CZMA, successfully opposed this amendment in arguing that

> "The amendment . . . goes beyond the territorial sea [a reference to three-mile coastal zone] and goes into what we agreed on and compromised on awhile ago. It goes beyond any territorial sea to construction of any facility on the ocean floor, into what we call a contiguous zone from the 3-mile limit to the 12-mile limit." *Id.* at 14184.

Even though both the House and Senate limited Section 307(c)(1) to federal activities "in the coastal zone," other points of difference necessitated a conference. In that conference, the phrase "in the coastal zone" was, without explanation, changed to "directly affecting the coastal zone."[11] There was no suggestion in the conference report that this change in the statute contemplated state CZMA authority over OCS leasing.

To the contrary, the conference report expressly stated that the bill does not:

> "in any way change the states' or Federal interests in resources of the territorial waters or Continental Shelf, as provided for in the Submerged Lands Act and the Outer Continental Shelf Lands Act."[12]

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[11] H.R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 7, 14 (1972) (Section 307(c)(1) of S. 3507).

[12] *Id.* at 12.

Indeed, Congress incorporated a specific provision in Section 307 of the 1972 CZMA that

> "Nothing in this title shall be construed—
>
> "(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters. . . ." 16 U.S.C. § 1456(e).[8]

Notwithstanding this legislative history, the Ninth Circuit adopted the district court's conclusion that the substitution of "directly affecting" for "in" the coastal zone "expand[ed] the scope of the provision" (53a) so as to allow the States to apply their CZMA programs to OCS leasing decisions. This Court's decision in *North Dakota* v. *United States*, ___ U.S. ___, 103 S. Ct. 1095, 1103-04 (1983), reveals the lower court's error in so interpreting this unexplained change in Section 307(c)(1).

There, North Dakota relied upon a provision in the Wetlands Act of 1961 requiring gubernatorial consent to the Secretary of the Interior's acquisition of wetlands for migratory bird sanctuaries, in arguing that continuing consent was essential to the acquisition of such lands. In rejecting this argument, the Court stated that

> "our conclusion in this regard is strengthened by the fact that, at the time of its enactment, the gubernatorial consent provision was not at all controversial. It was added by the Senate Committee on Commerce without explanation, and was accepted by the House of Representatives without explanation or discussion." *Id.* at 1104 (citations omitted).

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[8] When the conference report was presented to the House and Senate for final approval, the only member of Congress who commented on any issue of relevance here stated that he was "deeply disappointed" that a House proposal, which would have permitted States to extend marine sanctuaries beyond the 3-mile coastal zone to permit state control of federal offshore oil and gas operations, had not been accepted. 118 Cong. Rec. 35549 (1972). Had the conference report accomplished the result now perceived by the lower court, there would have been no occasion for that disappointment.

On this basis, the Court was

> "unwilling to assume that Congress, while expressing its firm belief in the need to preserve additional wetlands, so casually would have undercut the United States' ability to plan for their preservation." *Id.*

The same observation applies to the change in Section 307(c)(1) brought about by the unexplained substitution of the phrase "directly affecting the coastal zone" for "in the coastal zone." In the light of the clear delineation of state-federal authority reached by the 1953 Compromise and the steadfast refusal in the debates preceding the 1972 conference report to extend state authority to the OCS, it is simply inconceivable that Congress, in adopting an unexplained amendment to the 1972 CZMA, "so casually would have undercut the United States' ability" to administer the OCS.

2. Section 307(c)(3)—The 1976 History

The 1976 legislative history of the CZMA amendments reinforces the conclusion that should be drawn from the 1972 history. In 1976, Congress focused on the relationship between the CZMA and OCS oil and gas activities and specifically rejected a proposal that the CZMA be applied at the leasing stage of an OCS project.

Some members of Congress considering the 1976 Amendments believed that Section 307(c)(3), as originally written, but not Section 307(c)(1), might apply to the Secretary's leasing decisions. Thus, the Senate report, S. Rep. No. 277, 94th Cong., 1st Sess. 19 (1975), expressed the view that:

> "[a]s presently written in the law, this provision [Section 307(c)(3)] gives coastal State governors the opportunity to determine whether the granting of specific Federal licenses or permits would be consistent with State coastal zone management programs. The Committee's intent when the 1972 Act was passed was for the consistency clause to apply to Federal leases for offshore oil and gas development, since such leases were viewed by the Committee to be within the phrase 'licenses or permits.' "

The Senate committee went on to propose the explicit inclusion of the term "lease" within the phrase "license or permit" in Section 307(c)(3). It stated that this confirmation of its reading of Section 307(c)(3) would:

> "[i]n practical terms, [mean] . . . that the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies." *Id.* at 20.[54]

This, of course, is the precise result reached by the lower courts in their construction of Section 307(c)(1).

However, the Senate Committee's approach to Section 307(c)(3) and the proposed amendment to confirm it were resisted by the Administration. As an Assistant Secretary of the Interior explained:

> "Our concern is that people may construe this as a requirement that the lease applicant prove Federal consistency before he is physically able to do it. If he does not know what he is going to find out there and has no way of quantifying what he intends to bring ashore, there may be, if this requirement is placed in an amendment to the Coastal Zone Management Act, a legal bar to us issuing a lease."[55]

Because of these and similar concerns, the amendment that would have added the term "lease" to Section 307(c)(3) was deleted on the House floor to permit further clarification of the matter in conference.[56]

There, focused attention was given to the question whether OCS leases should be subject to consistency review. It was

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[54] The House Committee had the same view of the matter. H.R. Rep. No. 878, 94th Cong., 2d Sess. 52-53 (1976).

[55] Hearings on Coastal Zone Management Before Subcomm. on Oceanography of House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 204 (1975).

[56] 122 Cong. Rec. 6128 (1976).

determined that they should not. Instead, Section 307(c)(3)(B) was added to the statute providing for CZMA consistency review only at the later exploration and development/production stages of OCS activities. As the conference report explained:

> "The conference substitute . . . specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior."[37]

Thus, in the 1976 CZMA amendments Congress explicitly addressed the role of the CZMA in the OCS lease issuing process and determined not to make leases subject to CZMA consistency.

3. The 1980 Committee Reports

In the face of the 1972 and 1976 legislative histories, the lower courts relied on so-called 1980 "legislative history," where House and Senate reports suggested a possibly expansive, but unquestionably ambiguous and vague, definition of "directly affecting."[38] These reports do not sustain the decision below.

First, as the lower courts conceded, Congress proposed no amendments to Section 307 of the CZMA in 1980, but merely commented upon that section. To call these comments upon a statute that was enacted years earlier "[l]egislative history is a misnomer because, legislative observations ten [or in this case,

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[37] S. Conf. Rep. No. 987, 94th Cong., 2d Sess. 30 (1976); H.R. Conf. Rep. No. 1298, 94th Cong., 2d Sess. 30 (1976).

[38] The "functional interrelationship" and "coastal management consequence" formulations of the standard for applying Section 307(c)(1) referred to by the lower court (17a) are essentially circular. A federal activity has such an "interrelationship" or "management consequence" only if it is within the scope of the statute.

eight] years after passage of the Act are in no sense part of the legislative history." *United Airlines* v. *McMann*, 434 U.S. 192, 200 n.7 (1977).[39]

Indeed, it is settled law that post-enactment commentary by even those members of Congress who participated in the enactment of a disputed statute is an unreliable guide to its meaning. *See CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980):

> "The less formal types of subsequent legislative history [as opposed to subsequent legislation] provide an extremely hazardous basis for inferring the meaning of a Congressional enactment. . . . Such history does not bear a strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change."[40]

Finally, the 1980 House report recognized that in 1972 Congress had not "provide[d] for the problems that states begin to anticipate in connection with increased energy-related activities in the coastal zone" and observed that the 1972 Act gave the States "no part in any decision concerning development on the Outer Continental Shelf. . . ." H.R. Rep. No. 1012, 96 Cong., 2d Sess., 26-27 (1980). To the extent relevant here, this reading of the statute confirms that Congress in 1972 did not undo the 1953 Compromise of the Tidelands Oil Issue.

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[39] The change in composition in the Senate and House Committees between the 1972 enactment of Section 307(c)(1) and the 1980 reports further diminishes their significance. For example, only 5 of the 17 members serving on the Senate Commerce, Science and Transportation Committee in 1980 had served on that committee in 1972. *See* [1972] U.S. Code Cong. & Ad. News LXXVII, CIV-CV; [1980] U.S. Code Cong. & Ad. News XCI, CXXVII.

[40] *See also* Bread Political Action Comm. v. FEC, ___ U.S. ___, 102 S. Ct. 1235, 1237-38 (1982).

Thus, the Ninth Circuit clearly erred in placing "substantial weight" (17a) upon the 1980 committee reports to support its conclusion that Section 307(c)(1) applies to OCS leasing.[41]

IV. POLICY CONSIDERATIONS DO NOT SUPPORT THE CONSTRUCTION OF THE CZMA EMBRACED BY THE LOWER COURTS.

The lower courts in large measure based their decision upon the policy argument that a broad construction of the CZMA was necessary to encourage cooperation between the federal and state governments with respect to OCS leasing. We have previously exposed one aspect of the error undermining this assertion, in demonstrating that the 1978 Amendments to the OCSLA specifically provide at every point of the OCS process for state participation and did not contemplate the invocation of state CZMA programs for the selection of OCS tracts for leasing. There is another basic flaw in the policy argument.

This Court noted in *Watt* v. *Energy Action Education Foundation*, 454 U.S. 151, 154 n.2 (1981), that the "basic purpose" of the 1978 OCSLA amendments was to "promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf," citing H.R. Rep. No. 95-590, p. 53 (1977). To achieve this end, Congress segmented the OCS process and provided a "pyramidic . . . structure [for the OCS decisional process], proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California* v. *Watt*, 668 F.2d at 1297.

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[41] *See also* Weinberger v. Rossi, ___ U.S. ___, 102 S. Ct. 1510, 1516 (1982); County of Washington v. Gunther, 452 U.S. 161, 176 n.16 (1981); United States v. Clark, 445 U.S. 23, 33 n.9 (1980); Quern v. Mandley, 436 U.S. 725, 736 n.10 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 132-33 (1974); United States v. Philadelphia National Bank, 374 U.S. 321, 348-49 (1963); United States v. United Mine Workers, 330 U.S. 258, 281-82 (1947).

As the D.C. Circuit in *North Slope Borough* v. *Andrus* 642 F.2d at 609, recognized, the OCSLA 1978 amendments were thus designed to require "mandatory stage-by-stage review" so as to "prevent . . . the telescoping of any and every projected hazard to endangered life and the environment into one overwhelming statutory obstacle" that must be confronted at the early stages of a project. Rather than creating such roadblocks at the inception of a project or during its early stages, the OCSLA instead "ensur[es] graduated compliance with environmental and endangered life standards." *Id.*

By so structuring OCS decision-making, Congress removed the necessity of making final tract-deletion decisions at preliminary stages of the OCS process on the basis of environmental issues which could safely be resolved later. In so doing,

> "litigation, and especially delay from litigation, were to be discouraged—particularly at the pre-exploration, pre-development leasing stages, where the chances of harm to the environment are slim." *Village of Kaktovik* v. *Watt*, 689 F.2d at 225-26.

California's assertion of the right under the CZMA, at OCS leasing, to insist upon tract deletions due to possible obstacles that cannot arise until years later at the production/development stage of an OCS project is inconsistent with the congressional scheme underlying the OCSLA.

Moreover, the Ninth Circuit's attempt to preserve federal paramountcy over the OCS through the "maximum extent practicable" qualification of the Secretary of the Interior's purported consistency responsibilities at the leasing stage will, as that court virtually conceded, breed incessant litigation over OCS leasing. This is so because of the vague and general policies set forth in state CZMA programs, which led the very court upon which California relied below in claiming federal sanction for its program, to term the CZMA administrative scheme "wholly unmanageable," "befuddl[ing]," and leading inevitably to "a morass of problems." *See* pp. 6, 7 & n.4. The selection of OCS tracts for leasing can be extracted from this "morass" by applying the terms of the OCSLA and CZMA as

they were written and as they were interpreted by the members of Congress who enacted them.[42]

Plainly, it is not good policy—more importantly it defies the policy selected by Congress in the OCSLA—to apply CZMA programs in the manner envisioned by the lower courts. Thus, policy considerations, like the terms of the OCSLA and CZMA and their legislative histories, stand against the Ninth Circuit's construction of the CZMA.

CONCLUSION

For the reasons stated above, the Ninth Circuit's decision that the selection of OCS tracts for leasing is a federal activity "directly affecting" a state's coastal zone should be reversed

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[42] Section 307(c)(3)(B), but not Section 307(c)(1), provides a clear-cut mechanism for federal administrative oversight with respect to the application of CZMA programs to the exploration and production/development stages of OCS projects. In the event that there is a disagreement with respect to consistency at these stages, the Secretary of Commerce may override a state's consistency objections.

and the case should be remanded with directions to enter judgment for all defendants on the CZMA issue.

Respectfully submitted,

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